

OPINION

The Defendant, Rodney J. McDougale, appeals as of right from his conviction in the Criminal Court of Shelby County. Defendant was indicted on one count of first degree murder as a result of aggravated child abuse. Following a jury trial, Defendant was convicted of reckless homicide, a Class D felony. At the sentencing hearing, Defendant was ordered by the trial court to serve a four (4) year sentence in the Tennessee Department of Correction. Defendant appeals on the basis that his sentence is excessive and is not in accordance with the Tennessee Criminal Sentencing Reform Act of 1989. We affirm the judgment of the trial court.

When an accused challenges the length, range or the manner of service of a sentence, this court has a duty to conduct a de novo review of the sentence with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401 (d). This presumption is “conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances.” State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991).

If our review reflects that the trial court followed the statutory sentencing procedure, imposed a lawful sentence after having given due consideration and proper weight to the factors and principles set out under the sentencing law, and made findings of fact adequately supported by the record, then we may not modify the sentence even if we would have preferred a different result. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

At the sentencing hearing, the Defendant testified that he was twenty-seven (27) years old and had been in the Navy. He has been employed by the Postal Service from 1991 up until the time of his arrest. After his arrest for this crime in 1995, he worked with a security company and hopes to return to the Postal Service. Since this occurred, Defendant has been attending family counseling through his minister. He admitted to making many mistakes, but denied killing his child. Defendant asked the trial court to give him an alternative sentence of probation due to the fact that he had already served seventeen (17) months prior to trial and wanted to begin counseling. Defendant and his wife are still together and plan on having more children at a later time.

The trial court found that while the Defendant may not have purposefully tried to kill his child, he did use "terrible and outlandish judgment." In his reasoning, the trial court stated that because this child was a "cradle baby," being four (4) months old, the Defendant should have known that not holding the neck of such a young child could cause damage when shaking that child. The trial court took into account that the Defendant was suffering from his own grief, was a first offender, did not have any previous record, and had a good work record and potential in terms of his future in the community. Because this was such a terrible act and the time that Defendant would ultimately serve, the trial court sentenced the Defendant to serve four (4) years and a fine of \$1,000.00. In determining whether Defendant was to serve an alternative sentence, the trial court refused to suspend any remainder of time Defendant had left of his sentence because of the aggravated circumstances of this case. Furthermore, because of the serious nature of this homicide, the trial court believed it could not grant probation even though Defendant had no prior

record. The trial court noted the fact that the child was “rottening [sic] in his grave” overshadowed any of Defendant’s assertions for probation.

In this case, the record fails to show that the trial court considered the sentencing principles and all relevant facts and circumstances. Specifically, the trial court failed to place in the record any specific references to mitigating and enhancing factors as required by the 1989 Sentencing Act. Due to the trial court’s failure to consider these factors, we conduct our review de novo without a presumption of correctness. State v. Connors, 924 S.W.2d 362, 363 (Tenn. Crim. App. 1996) (*citing State v. Shelton*, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992)).

In conducting a de novo review of a sentence, this court must consider: (a) the evidence, if any, received at the trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) any statutory mitigating or enhancement factors; (f) any statement that the defendant made on his own behalf; and (g) the potential or lack of potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, and -210; see State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987).

For a Standard Range I Offender, the sentencing range for a Class D felony is two (2) to four (4) years. Tenn. Code Ann. § 40-35-112(a)(4). The trial court sentenced Defendant to the maximum of four (4) years pursuant to both the evidence at trial and the sentencing hearing as demonstrating the seriousness of this offense. Defendant’s presentence report does not indicate any previous criminal convictions, but it does provide evidence of his prior military and employment

experience. As a standard offender convicted of a Class D felony, Defendant is presumed to be a favorable candidate for alternative sentencing under Tennessee Code Annotated section 40-35-102(6). The nature and characteristic of the criminal conduct involved was sufficient for the State to seek imposition of the death penalty if Defendant were convicted of first degree murder.

While the court did not specifically state the application of enhancement factors, several of those factors do apply. Defendant, the victim's father, was responsible for the well-being of the infant. As a result of his actions, the victim died. Defendant's abuse of his position of private trust as the victim's father charged with his care and control was sufficient for application of enhancement factor (15). State v. Hayes, 899 S.W.2d 175, 187 (Tenn. Crim. App. 1995).

A victim is particularly vulnerable within the meaning of enhancement factor (4) when the victim lacks the ability to resist the commission of the crime due to age, a physical condition, or a mental condition. State v. Boggs, 932 S.W.2d 467, 473 (Tenn. Crim. App. 1996) (*citing* State v. Butler, 900 S.W.2d 305, 313 (Tenn. Crim. App. 1994)). As evidenced within the State's proof, as a four (4) month old infant the victim had an incapacity to resist or to summon help and could not testify against the Defendant. See State v. Adams, 864 S.W.2d 31, 35 (Tenn. 1993). Therefore, the application of enhancement factor (4) is appropriate in the case sub judice. The "vulnerability" factor is completely separate from the "private position of trust abuse" factor; it takes separate facts to support each factor, and the evidence may support either one independent of the other. State v. Jernigan, 929 S.W.2d 391, 397 (Tenn. Crim. App. 1996). The evidence in this case supports the use of both factors.

Upon review of the mitigating factors under Tennessee Code Annotated section 40-35-113, we find none to be applicable to this Defendant pursuant to his sentencing. In addition, the Defendant does not urge the application of any mitigating factors within his brief. Within his personal statement, Defendant expressed his regret over the death of his infant son, but denied that he committed the offense. Defendant was currently undergoing counseling with his personal minister, and agreed to attend further counseling if ordered as a condition of sentencing by the trial court.

While the trial court did not specifically state either orally or in writing which enhancement and mitigating factors applied, we cannot find any error in the four (4) year sentence imposed upon the Defendant. Two (2) enhancement factors applied, but no mitigating factors, and “[s]hould there be enhancement but no mitigating factors, then the court may set the sentence above the minimum in that range but still within the range.” Tenn. Code Ann. § 40-35-210(d). Four (4) years is within the appropriate range for the Defendant, and is particularly appropriate given the facts and circumstances of this case.

In determining whether Defendant was eligible for an alternative sentence, the 1989 Sentencing Act does not provide that all offenders who meet the criteria of section 40-35-102(5) and (6) are entitled to relief; rather, it requires that sentencing issues be determined by the facts and circumstances presented in each case. See State v. Taylor, 744 S.W.2d 919, 922 (Tenn. Crim. App. 1987). When imposing a sentence of total confinement, our Criminal Sentencing Reform Act mandates the trial court to base its decision on the considerations set forth in Tennessee Code Annotated section 40-35-103. These considerations which militate against

alternative sentencing include: the need to protect society by restraining a defendant having a long history of criminal conduct; whether confinement is particularly appropriate to effectively deter others likely to commit a similar offense; the need to avoid depreciating the seriousness of the offense; and the need to order confinement in cases in which less restrictive measures have often or recently been unsuccessfully applied to the defendant. Tenn. Code Ann. § 40-35-103(1).

In determining whether to grant probation, the judge must consider the nature and circumstances of the offense, the defendant's criminal record, his background and social history, his present condition, including his physical and mental condition, the deterrent effect on other criminal activity, and the likelihood that probation is in the best interests of both the public and the defendant. Stiller v. State, 516 S.W.2d 617, 620 (Tenn. 1974). The burden is on the Defendant to show that the sentence he received is improper and that he is entitled to probation. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991).

The trial court held the Defendant was not eligible for probation due to the serious and aggravated circumstances of this case. While the Defendant's criminal, physical and mental record may support the grant of an alternative sentence, the need to avoid depreciating the seriousness of this offense does not permit this court to reverse the findings of the trial court. State v. Grady Ingram, No. 03C01-9612-CR-00464, slip op. at 7-8, Loudon County (Tenn. Crim. App., at Knoxville, Jan. 8, 1998) (No Rule 11 application filed). Furthermore, the fact that the seriousness of the offense precludes Defendant from being eligible for probation also precludes his eligibility for the Community Corrections program or split confinement due to the

purpose of the 1989 Criminal Sentencing Reform Act to punish a defendant “in relation to the seriousness of the offense.” Id.

At trial, Dr. O. C. Smith testified that the cause of the infant’s death was Shaken Baby Syndrome, which essentially is the child dying as a result of forceful shaking. When an infant’s head is shaken vigorously back and forth, the pressure inside the head causes hemorrhages within the back part of the eye known as the retina. These hemorrhages were found within the infant’s retina by Dr. Smith. As a result of the brain damage caused by the vigorous shaking, the infant’s blood did not clot and he started to bleed into various body surfaces. In addition, muscles in the infant’s neck and upper arms were damaged, probably as a result of injuries incurred during the actual shaking process. In describing the time frame of the infant’s injuries in relation to his admission to LeBonheur Hospital, Dr. Smith concluded that it was a “vigorous or very severe injury.” The severity of the injury was incurred either due to the actual physical shaking of the infant’s head causing his brain to damage itself or, additionally, the holding of the infant in a forceful manner during the shaking, preventing the child’s ability to breathe properly.

The morning prior to his death, the infant was in normal health, but the afternoon the infant was examined at LeBonheur Hospital, the infant’s brain swelling was so great that the CT scan could not differentiate the gray matter of the brain from the white matter. Upon admission, the injuries to the child were so severe that the infant could not control his own blood pressure, breathing, heartbeat or body temperature. While specifically denied by the Defendant, this type of case is especially violent, shocking and reprehensible to this court so as to outweigh any other factor favoring the grant of alternative sentencing relief. See State v. Bingham,

910 S.W.2d 448, 454 (Tenn. Crim. App. 1995) (*citing State v. Hartley*, 818 S.W.2d 370, 374-75 (Tenn. Crim. App. 1991) (citations omitted)). We find the trial court's sentence of four (4) years of confinement is correct due to the nature and circumstances of this offense.

We affirm the judgment of the trial court.

THOMAS T. WOODALL, Judge

CONCUR:

JOHN H. PEAY, Judge

PAUL G. SUMMERS, Judge